LAND USE PLANNING AND LOCAL GOVERNMENT LAW

(LAW584H1F)
Fall 2004

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*** With the assistance of Rich Turner**

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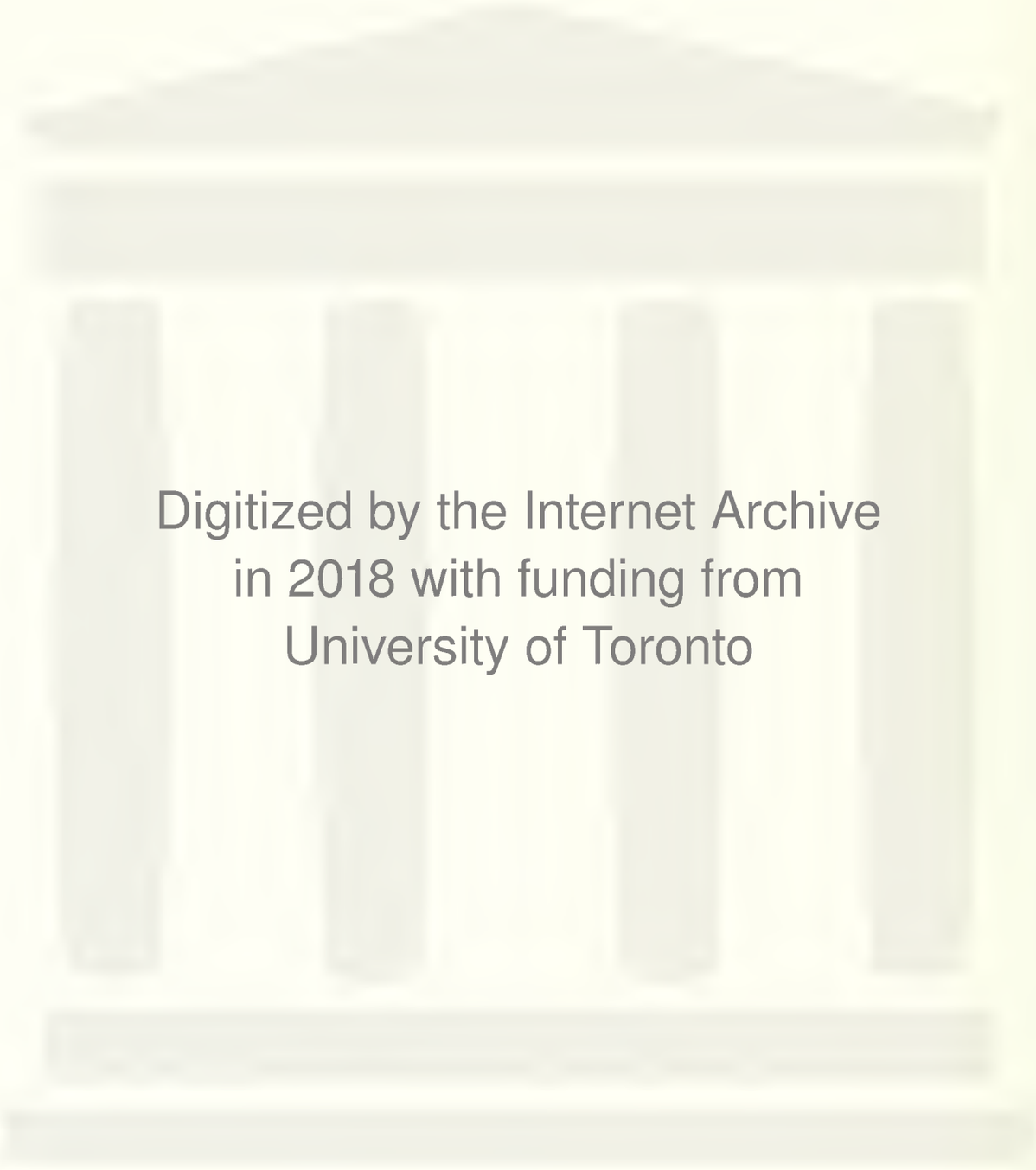

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INTRODUCTION TO PLANNING

The next two pieces were written for a four-part controversy in the Journal of Markets and Morality. Although they deal specifically with "new urbanism", a concept in planning which is explained below, they reflect two conceptual approaches to land use planning. As you read the two essays, try to contrast Bohl and Pennington's respective views regarding the role of the governments in "planning". Where do the authors differ in their interpretation of the facts, and where do they differ ideologically?

Charles C. Bohl, "To What Extent and in What Ways Should Governmental Bodies Regulate Urban Planning?"

(2003) 6 J. MARKETS & MORALITY 211

Introduction

This controversy piece introduces readers to the New Urbanism (NU), a movement in architecture and planning that advocates the use of traditional neighborhood design to build walkable, mixed-use neighborhoods and towns that emulate places of enduring quality and provide an alternative to low-density, single-use, automobile-dependent development patterns commonly referred to as "sprawl." Critics maintain that what is derided as sprawl is simply the development pattern of choice as generated by market forces over time and that NU and related smart-growth policies and transit initiatives are at odds with the lifestyle preferences and homeownership goals of Americans. This essay explores these and other arguments that grossly simplify and misinterpret NU and present an outdated, myopic view of an ever-changing and diversifying real estate market in the United States.

New Urbanism

Herbert Muschamp, architectural critic for the *New York Times*, has described NU as the "most important phenomenon to emerge in American architecture in the post-Cold War era."[1] Complete with its own Charter, annual conferences, and growing membership in the official Congress for the New Urbanism (CNU) organization, the movement attracts comparisons tothe International Congress of Modern Architecture (CIAM), the equivalent organization for modernism, even while it defines itself in direct opposition to modernist architecture and planning. Dubbed an architectural fad by many observers in the early 1980s, the movement has continued to grow and diversify its base for more than two decades and shows no signs of waning.

NU is an umbrella term, encompassing the traditional neighborhood development (TND), or "neotraditional" town planning, of Andres Duany and Elizabeth Plater-Zyberk; the pedestrian pocket concept presented in Kelbaugh's book of the same title (1989); the transit-oriented design (TOD) articulated by Peter Calthorpe and Shelly Poticha, and; the "quartiers" approach of Leon Krier.[2] New Urbanist design principles operate on a number of scales, from buildings, lots and blocks to neighborhoods, districts and corridors, and ultimately to entire cities and regions. Shared principles call for organizing development into patterns consistent with historic hamlets, villages, towns, and cities that were compact, walkable, mixed-use, and transit-friendly and contained a diverse range of housing.

ZONING

Introduction

Zoning powers allow municipalities to divide the municipal area into zones and to control land uses within each zone by a uniform set of rules. Generally, zoning can be divided into *restrictions on use*: industrial, commercial, residential (multiple family or single family), etc.; and *restrictions on bulk and height*. In theory, zoning can lead to neutral and systematic implementation of the policies set out in the municipality's official plan. Interestingly, wide-use of zoning preceded the wide-spread adoption of official plans, that is, many jurisdictions adopted zoning before the had official plans.

In Ontario, zoning powers derive from the *Planning Act,* R.S.O. 1990 c. P. 13, s. 34:

Planning Act, s. 34

Zoning by-laws

34. (1) Zoning by-laws may be passed by the councils of local municipalities:

Restricting use of land

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.

Restricting erecting, locating or using of buildings

2. For prohibiting the erecting, locating or using of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway....

Construction of buildings or structures

4. For regulating the type of construction and the height, bulk, location, size, floor area, spacing, character and use of buildings or structures to be erected or located within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway, and the minimum frontage and depth of the parcel of land and the proportion of the area thereof that any building or structure may occupy.

Minimum area and density provisions

(3) The authority to regulate provided in paragraph 4 of subsection (1) includes and, despite the decision of any court, shall be deemed always to have included the authority to regulate the minimum area of the parcel of land mentioned therein and to regulate the density of development in the municipality or in the area or areas defined in the by-law.

Prohibition of use of land, etc., availability of municipal services

(5) A by-law passed under paragraph 1 or 2 of subsection (1) or a predecessor of that paragraph may prohibit the use of land or the erection or use of buildings or structures unless such municipal services as may be set out in the by-law are available to service the land, buildings or structures, as the case may be.

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It can not be said that the ordinance in this respect "passes the bounds of reason and assumes the character of a merely arbitrary fiat." Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed.

It is said that the Village of Euclid is a mere suburb of the City of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village and, in the obvious course of things, will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow to the injury of the residential public if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts, apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question, this Court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny altogether or narrowly limit it; and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. We shall not attempt to review these decisions at length...

As evidence of the decided trend toward the broader view, it is significant that in some instances the state courts in later decisions have reversed their former decisions holding the other way.

The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are -- promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive by confining the greater part of the heavy traffic to the streets where business is carried on.

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions

of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities, -- until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not made, it cannot be said that the land owner has suffered or is threatened with an injury which entitles him to challenge their constitutionality.

[T]he gravamen of the complaint is that a portion of the land of the appellee cannot be sold for certain enumerated uses because of the general and broad restraints of the ordinance. What would be the effect of a restraint imposed by one or more of the innumerable provisions of the ordinance, considered apart, upon the value or marketability of the lands is neither disclosed by the bill nor by the evidence, and we are afforded no basis, apart from mere speculation, upon which to rest a conclusion that it or they would have any appreciable effect upon those matters. Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

And this is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER, dissent. [No reasons recorded]

A Note on the Origins of Zoning

The literature on zoning contains several narratives describing the rise of zoning in the twentieth century. Each of these narratives refers to historic truths (to some extent) and they all seem to complement each other. Some scholars trace the origins of zoning in North America to New York City, where height and bulk restrictions became necessary to avoid over-development which would have resulted in inadequate sunlight and circulation – a tragedy-of-the-commons story. Others point to the American West, where zoning laws were enacted to prohibit certain laundry businesses from operating in residential areas, or (again) to New York City where in 1916, the "Fifth Avenue Association" successfully lobbied to zone out the garment industry in order to prevent garment workers (mostly immigrants) from strolling Fifth Ave. on their lunch break. Many accounts emphasize the role of exclusionary motives grounded in apprehension of decline in land values, or in prejudice.

Nelson, a scholar of land use in the "property rights" tradition provides interesting background on some of the factors which influenced zoning...

How Zoning Decisions are Made

The following newspaper articles describe a conflict over the use of a particular parcel of land in Scarborough. Note the different interests involved and the types of arguments made. How would you characterize the decision-making process?

Kerry Gillespie, "Councillors vote against housing plan", Toronto Star, 8 April 2004

Protect the monarch butterflies, the blackberry patch, the white tail deer and even the skunks. That's the message Scarborough councillors heard and heeded yesterday when they voted to keep as parkland a vacant lot where the city wants to build 90 affordable homes. It was a bleak signal to 73,000 families in Toronto waiting for a home they can afford and thousands more who live in homeless shelters, said Habitat for Humanity's CEO Neil Hetherington. "We can tell the 6,900 children living in the shelter system now: 'Good news, we've just preserved an open area for you,'" he told the Toronto East community council, which is made up of local city councillors. Hetherington said he'd rather tell low-income working families that "we've actually started to develop affordable homes. We can develop a home and provide you with hope and dignity."

The debate is over a parcel of land southeast of Lawrence and Morningside Aves. Those on the other side of the fight were equally impassioned. "Do we destroy the environment for the sake of 90 families? I say no. This is more valuable to the public as open space than for homes for a fortunate 90 families," said Councillor Glenn De Baeremaeker...

Bruce Smith, a long-time local resident, described the wonderful times he and neighbours have wandering through the wooded area. "This property is home to wildlife that must be protected. There are raccoons, foxes, skunks, deer, bats and a wide variety of birds," Smith said. It's also a play area for local children who "build forts among the trees and catch bugs," he said. "On a hot summer day, families pick buckets of berries from the large blackberry patch. These experiences should not be taken away from our community."

The city designated the land for housing in 1997. But nearly 900 residents recently signed a petition saying they want it turned into parkland. Up against them are 700 nuns from 40 different congregations who have raised $2.3 million for this project after the city's housing staff chose the site.

In an 8-1 vote, most councillors sided with residents. The matter goes to full council next week, where the pro-parkland decision could be upheld or overturned.

"This land should be green forever. We can build townhouses somewhere else," De Baeremaeker said. De Baeremaeker even offered up a site in his ward beside the LRT station at McCowan Rd. and Highway 401.

While several councillors said they were voting for the parkland option because of De Baeremaeker's offer, the city's housing development officer wasn't impressed. "It's the oldest and most common bait and switch game that has people dancing all around the city and never getting anything built," Peter Zimmerman said. He pointed out that the McCowan and 401 site isn't suitable for low-rise houses, which is what Habitat for Humanity volunteers build...

Residents spoke about preserving green space yesterday, but that's not the whole truth, Zimmerman said. He has read all the letters opposing the housing that were submitted to the city after last month's information meeting. "Half of them were about property values and 'We have enough poor people.' To have this now framed as an environmental issue is frankly dishonest," Zimmerman said...

Councillor David Soknacki, the only one to vote against the parkland, said the city will make money on the housing development and doesn't have the money to build a park there.

The Theory of Public Goods, Zoning and Land Values

Zoning's effect on land values is a central theme in land use regulation discourse. This theme can be traced back to an enormously influential article by Charles Tiebout, "A Pure Theory of Local Expenditures" (1956) 64 J. Political Economy 416. The title is a direct play on Nobel prize winner Paul Samuelson's famous 1954 article, "The Pure Theory of Public Expenditures". Samuelson had analyzed the "free rider problem" that governments face when they provide goods and services. If no one can be excluded from consuming these public goods (e.g., public parks, community policing), individuals have an incentive to understate their true preferences to reduce their own tax burden, while still hoping to enjoy the public good supplied by others. (This means that markets fail to provide such goods efficiently, and some form of government intervention is needed).

Tiebout's insight was that individuals can reveal their true preferences by "voting with their feet". Tiebout hypothesized that if different local governments offered different packages of public goods and services, accompanied by different tax price tags, then individuals would move to those jurisdictions that offered them their preferred combination. In effect, Tiebout argued that no political solution for the problem of public goods is necessary because competition between local governments would ensure efficient provision of public goods.

What's zoning got to do with it? Tiebout's hypothesis assumed that individuals are perfectly mobile. But couldn't individuals free-ride by moving to upscale communities to enjoy their high amenities? Economist Bruce Hamilton added another piece to the puzzle by explaining this problem in "Zoning and Property Taxation in a System of Local Government" (1975) 12 Urban Studies 205. Imagine a homogeneous suburb of upscale homes (if you've lived in the GTA, this will not be difficult). This community can provide public goods such as parks, fine schools and clean and safe streets, and finance them from local property taxes. Into this community may wish to move a family that can only afford a trailer home. As Hamilton explained, in a system of local taxation based on property values (i.e., property taxes are levied in proportion to assessed property values), the less affluent entrants can "free-ride" by enjoying the same level of amenities while paying less taxes. Hamilton posited that "the Tiebout Hypothesis seems to be a formula for musical suburbs, with the poor following the rich in a neverending quest for a tax base."

Zoning is Hamilton's answer to this "problem". By enacting zoning by-laws which provide that "No household may reside in this community unless it consumes at least some minimum amount of housing" upscale communities can ensure certain stability.

The most recent addition to the literature in this tradition comes from another economist, William Fischel in *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (2001). In this book, Fischel argues that decentralized, local governments provide a desirable combination of taxes and spending – and provide local services more effectively than larger-area governments – because the homevoter (a homeowner who votes) seeks to maximize the value of his or her family home. Fischel's argument is both descriptive and normative: his theory not only explains zoning policies of suburban municipalities (i.e., these local governments pass land use controls on behalf of their voters to protect and enhance home values), but also calls for decentralization of land use regulation. Land use regulation is the *raison d'être* of local governments, and that's how things ought to be.

VARIANCES

Introduction to Variances

A variance can be described as administrative authorisation to develop or use property in a manner otherwise prohibited by the applicable zoning. The purpose of variances is to provide relief or a "safety valve" in appropriate circumstances, as Rogers, *Canadian Law of Planning and Zoning* explains (at 210.7):

> Because zoning by-laws are expressed in general terms and are designed to apply to the normal situations, they cannot cover all of the unusual conditions of topography, size and shape peculiar to a particular parcel of land, giving rise to problems of construction and location that are not foreseeable when the by-laws are enacted. Hardship may often occur to users of land if a by-law is enforced to the letter of the law...
>
> To avoid having the local representatives continually beset with time-consuming requests for permission to deviate from the by-law, most enabling statutes provide for the granting of variances or adjustments in the application of the by-law to a particular parcel of land.

Variances are faster and cheaper than zoning amendments. Typically, variances are requested regarding bulk and use (a typical request is to allow the construction of a bay window, when the zoning by-law requires a certain distance from the side lot line).

In Ontario, ss. 44-45 of the Planning Act give municipalities the ability to delegate the power to grant a variance to a "committee of adjustment". The committee may, upon the application of an owner of any land, building or structure affected by a zoning by-law or an interim control by-law, grant a minor variance from the provisions of such by-law provided that, in the opinion of the committee (a) the variance is minor; (b) is desirable for the appropriate development or use of the land, building or structure; (c) the general intent and purpose of the by-law and the official plan are maintained (s.45 (1)).

Fred Doucette Holdings Ltd. v. Waterloo (City)

[1997] O.J. NO. 6292 (GEN. DIV.)

Reasons for judgment were delivered by Sharpe J., concurred in by Southey J. Separate reasons were delivered by Keenan J.

¶ 1 **SHARPE J.**:— This is an application for judicial review of a decision of the Committee of Adjustment of the City of Waterloo granting an application for a "minor variance" to a zoning by-law. The site in question is located in an area zoned industrial. The respondent Meats Galore asserts that at the site it assembles and processes certain food products, a permitted use under the by-law. The by-law permits up to 50 per cent of the building floor area to be used for the display and retailing of products produced, assembled or repaired on the site. Meats Galore also carries on a retail operation in 50 per cent of its building area. The effect of the Committee of Adjustment's decision under review is to allow the respondent Meats Galore to retail food products that are not processed at the site. The applicant operates a competing business in the City of Waterloo and challenges the authority of the Committee of

Note

1) In *Hornsby v. Toronto (City)* (2002), 44 O.M.B.R. 466, the applicants planned to subdivide two lots into three and sought a variance to allow for the construction of integral garages on each new home. The new lots had 7.05 m, 6.63 m, and 6.67 m of frontage, but the by-law required 7.62 m to permit an integral garage. This application was approved by the O.M.B. as a minor variance, with the caveat that a permit for front-pad parking (the only other viable parking alternative) had to be pursued. The integral garages would only be allowed if the front-pad parking application was rejected. The ability to park was seen as aiding development, but it had to be achieved in the way that least interfered with the neighbouring lands.

2) In *Dellapina v. Toronto (City) Committee of Adjustment* (2002), 44 O.M.B.R. 113, a lot owner planned to demolish a bungalow and replace it with a two-storey detached home. To facilitate this, minor variances were sought to allow the side yard to be reduced from the by-law required 0.9 m to 0.6 m on both sides of the property. Both variances were granted, but Dellapina, a neighbouring landowner, appealed the variance that bordered his home. The O.M.B. found that the reduced side yard would have an undue adverse impact on Dellapina's property (it would hamper his access to the rear of his home), and therefore was not minor in nature. This meant that it did not pass the test from s.45(1) and therefore could not be allowed. The variance for the other side of the property was approved.

INTERIM CONTROL BYLAWS

Introduction

An interim control by-law (ICB), known also as "the big freeze", is a mechanism available to municipalities in Ontario. It allows a municipality to freeze the use of land in an area for a period of up to two years in order to deal with a serious planning issue which requires further study. As an example, Torono has recently imposed a temporary ban on all drive-throughs in residential neighbourhoods in order to complete a study of their planning implications (the ICB came as a response to neighbourhood ratepayer opposition following an announcement by McDonald's that it intended to turn its outlet at St. Clair Ave. W. and Christie St. into a drive-through. Earlier this year, a permanent ban was upheld by the OMB).

Section 38 (1) of the *Planning Act*, R.S.O. 1990, c. P.13 sets out the parameters of ICB use:

> **38.** (1) Where the council of a local municipality has, by by-law or resolution, directed that a review or study be undertaken in respect of land use planning policies in the municipality or in any defined area or areas thereof, the council of the municipality may pass a by-law ... to be in effect for a period [up to] one year from the date of the passing thereof, prohibiting the use of land, buildings or structures within the municipality or within the defined area or areas thereof for, or except for, such purposes as are set out in the by-law.

The attributes of s. 38 are explained by John Mascarin (commentary before *839891 Ontario Inc. v. St. Catherines* (City) (1992), 90 D.L.R. (4th) 354):

> Section 38 allows ICBLs to be passed prohibiting the use of land, buildings or structures which are otherwise permitted within a defined area of a municipality. An ICBL may be in effect for a period of up to one year from the date of enactment and may be extended by by-law for up to two years from its enactment date (s. 38(2)). No notice of a public hearing prior to the enactment of an ICBL is required (s. 38(3)); notice and an appeal right follow the event. The affected parties are entitled to a hearing before the Ontario Municipal .... Finally, the statute prohibits the use of an interim control by-law after the effective operation of the initial ICBL for a period of three years (s. 38(7)).

The three year prohibition of using an ICB on land after having one expire is designed to ensure that municipalities cannot use ICBs to effectively create permanent zoning restrictions.

While the municipality is given the right to arbitrarily pass interim control by-laws, it has to be able to show a direct link between the study being conducted and the by-law being passed in order for it to stand (The five year review of the official plan does not constitute such justification). When contesting an interim control by-law, case law shows that the initial onus of proving an adverse impact is borne by the landowner. Once this threshold is passed, the onus shifts to the municipality to prove that it is justified in enacting the ICB: *Gilbert v. Oakville (Town)* (1986), 31 M.P.L.R. 157, 19 O.M.B.R. 168, and *Re Markham (Town) Interim Control By-law 160-86* (1987), 20 O.M.B.R. 51.

For the municipality to show justification it must comply with the four-part test that the OMB has developed to approve an interim control by-law:

a) s. 38 must be interpreted strictly in view of the fact that it permits a municipality to negate development rights;

supported by the evidence and he drew inferences that are not unreasonable. In my view, this court is not entitled to interfere with his conclusion. ...

Note: Loralgia Management Ltd. v. Oshawa (City)

(2002), 32 M.P.L.R. (3D) 52 (O.M.B.); 2004 CARSWELLONT 1289 (DIV. CT.)

Loralgia Management purchased property in the central business district of Oshawa that was zoned to permit operation of a medical clinic and pharmacy. It did so with the intention of relocating its clinic for patients with narcotic dependencies. The clinic had been in operation at another location in the same city since 1997 and employed methadone maintenance treatment. Loralgia's request for a building permit was referred to city council and discussed at a public meeting without notice to the owner. Based on ratepayer resistance to the clinic, the city passed an interim control by-law prohibiting the use of the land for treatment of narcotic dependent persons. Loralgia appealed to the Ontario Municipal Board (OMB). At the hearing the city attempted to support its use of the interim control by-law on the grounds that it was concerned about the lack of parking, loitering, public safety, and downtown revitalisation. The OMB disagreed and repealed the interim control by-law on the ground that the city's reasons did not amount to a planning rationale, as is required by the *Planning Act*. According to the OMB, "what the City had done was ban a specific type of medical clinic based not on the function of the clinic but on those who will use the clinic and what their medical condition is". (O.M.B., para. 23) The city appealed the board's decision to the court, but that appeal was dismissed. The court held that the OMB has wide powers to review interim control by-laws and was clearly acting within its jurisdiction in deciding that there was no legitimate planning rational for passing interim control by-law in question.

ROLE OF THE ONTARIO MUNICIPAL BOARD

Introduction

Perhaps no aspect of the land use planning system in Ontario is as controversial as the Ontario Municipal Board (OMB). The following description of the OMB is given on its website (<<http://www.omb.gov.on.ca/>>):

> The Ontario Municipal Board is an independent adjudicative tribunal that hears appeals and applications and resolves land use disputes under a variety of legislation.
>
> The Ontario government appoints Members to the OMB. Members include people from different areas of the province with diverse backgrounds such as lawyers, former elected officials, engineers, surveyors, planners and public administrators.
>
> Some of the issues that the OMB deals with include:
>
> * official plans
> * zoning by-laws
> * subdivision plans
> * consents to sever land
> * minor variances from local by-laws
> * development charges
> * applications for aggregate licences, and
> * compensation for expropriated land.

You may have already formulated an opinion about the OMB based on the caselaw you've read. As you read the following case, evaluate the justifications for review of municipal decisions by the OMB. Also recall our discussion of Komesar's "Law's Limits"...

Re Hopedale Developments Ltd. and Town of Oakville

[1965] 1 O.R. 259-266 (Ont. C.A.)

1 This is an appeal upon a question of law only from an order of the Ontario Municipal Board (hereinafter referred to as "the Board") dismissing an application by the appellant for an order directing the council of the respondent municipality to amend a restricted area zoning by-law.

2 The appellant owns approximately 4 $^{1}/_{2}$ acres of land in the Town of Oakville which land was zoned in 1959 by By-law 133 of the Township of Trafalgar to permit use only for semi-detached houses and, for one lot, for a single-family home. The land is situated in a part of the town in which the development has been mainly of a single-family character but which has adjacent to it a 10-acre shopping centre.

3 The Township of Trafalgar was amalgamated with the Town of Oakville to form a new town under the name of the Town of Oakville in January, 1962. The history of the development prior to passing the above by-law in 1959 is outlined by the Board in its reasons as follows:

originally proposed, had as its main feature, a basic change in land use. The proposal as amended and approved by the Board is still of that basic character. What has been done is to reduce materially the size of the area affected and, consequent upon altered concepts of the way to deal with traffic problems in the area, to dispense with the Queensway extension.

Upon a consideration of the Act as a whole, I conclude that the scheme and object of the legislation demands a liberal as opposed to a restrictive interpretation of the word "modifications". Certainly, I can find no indication in the legislation of any intention narrowly to confine the application of the word. I would hold that the word as used in the Act is synonymous with "vary" or "amend" and that what was done bY the Board was well within the meaning of the term as I interpret it. I now turn to the submission that "modification" is a function reserved under the Act only to the Minister and is not a function permitted to the Board. Considerable has been said earlier concerning the position of the Board, visa-vis the Minister in the matters under consideration. It remains to add but a few further brief observations.

This challenge to the jurisdiction of the Board is based upon the fact that the Minister's function in respect of modifications is described in s. 12(1) and the matter of his approval is covered in s. 12(2). Since it is his approval function that the Board discharges under s. 34, it is contended that this arises only after all modifications previously have been determined bY the Minister. The argument is untenable. The submission of an official plan or of an amendment to the Minister pursuant to ss. 12 and 14, is for the purpose of his approval; indeed, "official plan" is, as already noted, defined as a plan approved by the Minister. The statutory substitution of the Board for the Minister is not limited to a particular stage of the proceeding in which approval is sought; s. 34 is explicit that it is when the Minister's approval or consent is "applied for" that the matter may or must go to the Board. In other words, the latter takes on all the Minister's functions including that of settling any modifications.

Accordingly, I would answer the second question in the negative, would dismiss the appeal and would direct the issuance of an order certifying to the Board the opinion of this Court upon the questions addressed to it...

Appeal dismissed.

[**NOTE:** The following case provides important discussion of the nature and purpose of interim control by-laws, as well as the role of the Onario Municipal Board as an expert tribunal, and of allegations of bad faith. As you read the case, recall our discussion of Fischel's theory and Komessar's description of bias.]

Equity Waste Management of Canada v. Halton Hills

(1998), 35 O.R. (3D) 321 (ONT. C.A.)

LASKIN J.A.: — On June 20, 1994, the appellant... Town of Halton Hills, passed an interim control by-law freezing development on approximately 1,000 acres of land bordering Highway 401, known as the Steeles Avenue 401 Industrial Corridor. When the by-law was passed, the respondent, Equity Waste Management of Canada, had already obtained approval from the Town's planning department to build a waste composting facility on 60 acres of land in the Corridor. The respondent, Panorama Investment Group Ltd., had obtained approval from the Town's Site Plan Committee to build a truck transportation terminal on 10 acres of land in the Corridor.

Both Equity and Panorama brought applications under s. 136(1) of the Municipal Act, R.S.O. 1990, c. M.45, to quash the interim control by-law on the ground that it was passed in bad faith. Greer J. granted these applications on September 15, 1994: 22 M.P.L.R. (2d) 167. The Town appeals her decision... Second, the Town submits that the motion judge erred in finding bad faith...

IV. The U.S. Approach

In the U.S., in addition to the question of statutory authority, conditions and charges required in exchange for development approval are examined under the taking clause, which states that "nor shall private property be taken for public purpose without just compensation". When will a condition or a charge cross the line between regulation and a taking?

Nollan v. California Coastal Commission

483 U.S. 825 (1987)

Justice SCALIA delivered the opinion of the Court.

James and Marilyn Nollan appeal from a decision of the California Court of Appeal ruling that the California Coastal Commission could condition its grant of permission to rebuild their house on their transfer to the public of an easement across their beachfront property. The California court rejected their claim that imposition of that condition violates the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. *Ibid.* We noted probable jurisdiction.

I

The Nollans own a beachfront lot in Ventura County, California. A quarter-mile north of their property is Faria County Park, an oceanside public park with a public beach and recreation area. Another public beach area, known locally as "the Cove," lies 1,800 feet south of their lot. A concrete seawall approximately eight feet high separates the beach portion of the Nollans' property from the rest of the lot. The historic mean high tide line determines the lot's oceanside boundary.

The Nollans originally leased their property with an option to buy. The building on the lot was a small bungalow, totaling 504 square feet, which for a time they rented to summer vacationers. After years of rental use, however, the building had fallen into disrepair, and could no longer be rented out.

The Nollans' option to purchase was conditioned on their promise to demolish the bungalow and replace it. In order to do so, under [regulation], they were required to obtain a coastal development permit from the California Coastal Commission. On February 25, 1982, they submitted a permit application to the Commission in which they proposed to demolish the existing structure and replace it with a three-bedroom house in keeping with the rest of the neighborhood.

The Nollans were informed that their application had been placed on the administrative calendar, and that the Commission staff had recommended that the permit be granted subject to the condition that they allow the public an easement to pass across a portion of their property bounded by the mean high tide line on one side, and their seawall on the other side. This would make it easier for the public to get to Faria County Park and the Cove. The Nollans protested imposition of the condition, but the Commission overruled their objections and granted the permit subject to their recordation of a deed restriction granting the easement.

On June 3, 1982, the Nollans filed a petition for writ of administrative mandamus asking the Ventura County Superior Court to invalidate the access condition. They argued that the condition could not be imposed absent evidence that their proposed development would have a direct adverse impact on public access to the beach. The court agreed, and remanded the case to the Commission for a full evidentiary hearing on that issue. *Id.,* at 36.

On remand, the Commission held a public hearing, after which it made further factual findings and reaffirmed its imposition of the condition. It found that the new house would increase blockage of the view of the ocean, thus contributing to the development of "a 'wall' of residential structures" that would prevent the public "psychologically ... from realizing a stretch of coastline exists nearby that they have every right to visit." The new house would also

remarkable ruling in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, (1987), local governments and officials must pay the price for the necessarily vague standards in this area of the law....

I write today to identify the severe tension between that dramatic development in the law and the view expressed by Justice BRENNAN's dissent in this case that the public interest is served by encouraging state agencies to exercise considerable flexibility in responding to private desires for development in a way that threatens the preservation of public resources. I like the hat that Justice BRENNAN has donned today ... and I am persuaded that he has the better of the legal arguments here. Even if his position prevailed in this case, however, it would be of little solace to land-use planners who would still be left guessing about how the Court will react to the next case, and the one after that... Like Justice BRENNAN, I hope that "a broader vision ultimately prevails." .

I respectfully dissent.

Note

HOW MUCH CAN BE TAKEN?

In *Nollan*, the U.S. Supreme Court established the "essential nexus" test as the yardstick against conditions will be assessed. But a related issue was discussed, i.e., assuming there is a nexus between the requirement and legitimate regulatory objectives, how heavy a burden can the landowner be required to bear? This question was answered in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In that case, an owner who applied for a permit to expand her store was required to dedicate the portion of her property that lies within the 100- year floodplain of a nearby creek for the improvement of a storm drainage system. In addition, because the larger store would add more traffic to the City's transportation system, she was also required to dedicate an additional 15-foot strip of land adjacent to the floodplain for a pedestrian/bicycle pathway. The path would be part of the City's interconnecting system of bike paths. This dedication requirement would encompass approximately ten percent of the property. The court found that the condition met the essential nexus test, but was nevertheless invalid because it was too burdensome. The Court thus added a further standard which regulation must meet which it called the "rough proportionality test". The Court said: "Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization particularly in metropolitan areas such as Portland. The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (citing *Pennsylvania Coal*, 260 U. S., at 416).